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No. 08-1157

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLIAM B. ROOZ,

Petitioner,

v.

ROBERTA KIMMEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED
(As Presented by Petitioner)

1. Can the bankruptcy court dismiss with prejudice a removed state fraudulent transfer complaint raising a post-petition marital transfer agreement and issue an injunction under the provisions of Bankruptcy Code, 11 U.S.C. §524(a)(3), when the transferor, who is the bankruptcy debtor spouse in a community property state, has filed a no asset petition and the [Chapter 7] trustee has abandoned claims upon these transfers?

2. Are the injunctive provisions of Bankruptcy Code, 11 U.S.C. §524(a)(3), applicable when the creditor alleges an intentional scheme to prevent collection of his or her judgment by the third-party transferee defendant who holds assets which would be available to the creditor, and the transfer would result in the ability [of the transferor] to file a petition in bankruptcy which denies holding assets of a community and the [Chapter 7] trustee has abandoned claims upon these properties?

3. Has the bankruptcy court erroneously failed to exercise its powers under 11 U.S.C. §105 in granting relief to a debtor who has entered into a post-discharge marital transfer agreement in alleged violation of a state fraudulent transfer act while a judgment is pending?

LIST OF PARTIES

This is a petition by a bankruptcy creditor named William B. Rooz who asserts a fraudulent transfer claim against a non-debtor spouse transferee, respondent Roberta Kimmel.

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OPINION BELOW

The only reported opinion below is one that took place in the Bankruptcy Appellate Panel for the Ninth Circuit, which is reported at 378 B.R. 630, 207 DJDAR 17265, and 367 B.R. 166.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 2008. Petitioner filed a petition for rehearing on December 8, 2008, and that petition for rehearing was denied by the court of appeals on December 23, 2008. The Petition for Writ of Certiorari was filed on March 13, 2009.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) which provides that cases in the courts of appeal may be reviewed by the Supreme Court by a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions involved in this petition.

The respondent contends that the only relevant statutory provisions are 11 U.S.C. §524(a)(3) which states that a discharge in bankruptcy operates as an injunction against the commencement or continuation of an action to collect or recover from or offset against

community property of the debtor that is acquired after the commencement of the bankruptcy case; and the California version of the Uniform Fraudulent Transfer Act which is codified at Cal. Civ. Code §§3439, *et seq.*

STATEMENT

In 1991 the petitioner, William B. Rooz ("Rooz") sued respondent, Roberta Kimmel, and her husband, David Kimmel, in the San Mateo County (California) Superior Court in connection with a failed real estate transaction.

Two years later, in 1993, while the aforementioned state court lawsuit was pending, the respondent (who, for clarity purposes, will be referred to by her first name "Roberta") filed a voluntary Chapter 7 bankruptcy case, in which she was granted a discharge the following year in 1994. Thereafter, the 1991 state court lawsuit proceeded against Roberta's husband, David Kimmel (who, for clarity purposes, will be referred to by his first name "David") which resulted in a judgment against David in May 1995.

In July 1995 Roberta and David entered into a written postnuptial agreement under California law, with the intention and effect of transmuting Roberta's future wages from community property to her separate property.

Some ten years later, in October 2005, David filed his own voluntary Chapter 7 case when Rooz obtained a writ of execution from the San Mateo County Superior Court to enforce his 1995 state court judgment. Rooz asserts that he first learned of the postnuptial agreement between Roberta and David when Rooz attended the meeting of creditors in David's Chapter 7 case in November 2005.

As explained in David's Brief in Opposition to the Petition for Writ of Certiorari filed concurrently herewith, in No. 08-1155, in February 2006 Rooz filed a nondischargeability adversary proceeding against David, seeking a determination that Rooz's 1995 state court judgment against David was nondischargeable. Subsequently, and apparently based upon the aforementioned postnuptial agreement, Rooz attempted to amend his nondischargeability complaint against David to add Roberta as a defendant.

The bankruptcy court held that David was discharged from liability on Rooz's 1995 state court judgment, and the bankruptcy court dismissed Rooz's claim against Roberta for lack of jurisdiction.

After the bankruptcy court dismissed Roberta from Rooz's nondischargeability adversary proceeding against David, Rooz commenced new litigation against Roberta in the San Francisco County (California) Superior Court, to recover a portion of Roberta's wages to satisfy Rooz's 1995 San Mateo County state court judgment.

In response, Roberta re-opened her 1993 bankruptcy case and removed Rooz's San Francisco County Superior Court case to the bankruptcy court, where she moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

The bankruptcy court granted Roberta's Rule 12(c) motion on the ground that Rooz's attempt to collect money from Roberta's wages to enforce his 1995 state court judgment, even if such wages remained community property despite the provisions of the postnuptial agreement, was barred by the discharge injunction provided by 11 U.S.C. §524(a)(3) which arose when Roberta received her bankruptcy discharge in 1994. Hence, according to the bankruptcy court, the characterization of the 1995 transmutation of Roberta's wages as a fraudulent transfer was irrelevant in view of the discharge injunction provided by §524(a)(3).

Alternatively, the bankruptcy court held that Rooz's fraudulent transfer action was barred by the seven-year statute of repose set forth in Cal. Civ. Code §3439.09(c), which provides that any such fraudulent transfer claim is extinguished seven years after the transfer has occurred.

Rooz appealed both bankruptcy court dismissal rulings (the one in favor of Roberta and the one in favor of David) to the Bankruptcy Appellate Panel for the Ninth Circuit ("the BAP") and to the Court of

Appeals for the Ninth Circuit. Both appellate courts affirmed in full.

ARGUMENT

Both the BAP and the court of appeals were correct in their decisions to deny any relief to Rooz. There is absolutely no merit to Rooz's claim that he has the right to assert the provisions of the California version of the Uniform Fraudulent Transfer Act ("UFTA") to reach Roberta's post-discharge wages, even if such wages were found to be community property.

I. THE INJUNCTION GRANTED IN FAVOR OF A BANKRUPTCY DEBTOR BY 11 U.S.C. §524(a)(3) BARS A CREDITOR FROM LEVYING AGAINST ASSETS SUBSEQUENTLY ACQUIRED BY THE DEBTOR POST-DISCHARGE

Beginning at page 6 of his petition, Rooz has presented a medley of irrelevant arguments in his attempt to evade the injunction set forth in 11 U.S.C. §524(a)(3) that is provided to a discharged debtor, such as Roberta, so that the debtor can obtain what is commonly called in bankruptcy a "fresh start." As the bankruptcy court, the BAP, and the court of appeals carefully explained in their decisions, the fundamental purpose of this statute is to protect a discharged

debtor from creditor claims that have been discharged wherein the creditor is seeking to reach property acquired by the debtor after receiving a discharge. As these courts noted, and as common sense tells us, a discharged debtor would have no "fresh start" if he or she could not acquire property after being discharged without being threatened by pre-discharge creditor claims, such as Rooz's pre-discharge judgment claim wherein he seeks to attach Roberta's post-discharge wages to pay on a debt that Roberta no longer owes because it was discharged in her bankruptcy.

This is not to say a creditor has no remedies. A creditor certainly has the right to look to the non-debtor spouse (e.g., David in the present case) to pay this debt from the non-debtor spouse's ***separate*** property if the non-debtor spouse is liable on the debt. It would be only the debtor spouse (e.g., Roberta here) and his or her separate property and all of the community property that would be immune from collection activity. [*Id.* §524(a)(3).]

In practical terms, as applied to the present case, this means Rooz had no right to sue Roberta to satisfy his 1995 state court judgment. Roberta's 1993 bankruptcy discharge fully embraced that debt. Under these circumstances, the only remedy available to Rooz to satisfy his judgment would be a claim against David's separate property. However, as David has explained in his opposition to Rooz's petition filed in the related case (No. 08-1155), David is no longer liable on this debt because he too has obtained a

bankruptcy discharge, and Rooz has failed to have David's discharge overturned.

In summary, then, the applicable statute, §524(a)(3), operates as a permanent injunction which prevents Rooz from suing Roberta to collect on a debt that was discharged in Roberta's 1993 Chapter 7 bankruptcy case, and Roberta's husband, David, is also immune from any liability for the same debt because he too obtained a discharge in his subsequently filed Chapter 7 case in 2005.

Nowhere in Rooz's petition does he cite any authorities which would enable him to evade these important bankruptcy discharge protections.

As an alternative argument, Rooz suggests that the injunction protection granted by §524(a)(3) applies only to those assets disclosed in a debtor's bankruptcy schedules. Once again Rooz has provided no authority for his argument.

Whether a debtor has properly disclosed his or her assets in a bankruptcy case is not relevant to §524(a)(3) injunction protection. Instead, the relevant statute under those circumstances is found in 11 U.S.C. §727(d) which states in relevant part that the trustee or a creditor may request the revocation of a discharge where the debtor knowingly and fraudulently failed to report the acquisition of or entitlement to property belonging to the bankruptcy estate. However, in subpart (e) of that statute there is a provision that states that any such request for the revocation of a discharge under these circumstances

must be brought within one year after the discharge has been granted. As noted above, Roberta obtained her discharge in 1994, some 15 years ago, and to date Rooz has never filed any adversary proceeding to have Roberta's discharge revoked.

In conclusion on this point, it is appropriate to repeat what the BAP stated in its summation:

> As we [the BAP] have explained, §524(a)(3) enjoins any act "to collect or recover from" community property "that is acquired after commencement of the case, on account of an allowable community claim" that has not been excepted from discharge in the bankruptcy case. 11 U.S.C. §524(a)(3). Thus, it was impossible for the community property (Roberta Kimmel's future wages) that was transmuted into separate property to have been a source of recovery for Rooz. We agree with the bankruptcy court that Rooz's further efforts to collect from Roberta Kimmel's post-bankruptcy wages "likely violate [the discharge injunction of §524] and expose [Rooz] to sanctions." *Kimmel* 367 B.R. at 174 n.11. [Record, Exhibit 21, page 15, lines 1-12.] [This summation can be found in Rooz's Appendix B, pages 19a-20a.]

II. ROOZ'S ATTEMPT TO USE THE UNIFORM FRAUDULENT TRANSFER ACT TO IMPOSE LIABILITY ON ROBERTA FOR THE 1995 STATE COURT JUDGMENT HAS NO MERIT

One of the central arguments that is woven throughout Rooz's petition, and also throughout all of the proceedings that took place in the courts below, is Rooz's contention that he may use the provisions of the California version of the Uniform Fraudulent Transfer Act ("UFTA") to impose liability on Roberta for Rooz's 1995 state court judgment despite the fact that Roberta obtained a discharge of this debt in her 1993 Chapter 11 proceeding. [California's version of the UFTA is codified at Cal. Civ. Code §§3439, *et seq.*]

According to Rooz, the transmutation agreement that Roberta and David executed as part of their postnuptial agreement in 1995, wherein Roberta and David agreed that Roberta's future wages would be transmuted from community property to her separate property, was a fraudulent transfer within the scope of the UFTA, and that under the UFTA, Rooz, as David's creditor, has the right to set aside that fraudulent transfer and treat Roberta's wages as community property that can be levied against to satisfy Rooz's 1995 state court judgment against David.

To fully understand this argument, it must be kept in mind that what Rooz is alleging is liability against Roberta, not liability against David. What

Rooz is saying is that even though David may be discharged from any liability on this debt, one of the assets of David's bankruptcy estate that can be used to satisfy Rooz's claim would be any community property, such as Roberta's wages, if the 1995 transmutation agreement is set aside and Roberta's wages are treated as community property.

For a variety of reasons, Rooz's UFTA argument must be rejected.

First and foremost, as indicated above, in making this UFTA argument Rooz is not focusing on any liability imposed against David. He is assuming, *arguendo*, that David has obtained a discharge of any debt he owes to Rooz, such as Rooz's 1995 state court judgment. The focus here is solely upon Roberta's alleged obligation to turn over her wages to David's bankruptcy estate.

Focusing on Roberta's wages, it is important to note that "wages" are not treated as assets in a bankruptcy case. David, when he filed his Chapter 7 petition in October 2005, was not required to schedule either his wages or Roberta's wages as an "asset" of his bankruptcy estate, and the same was true when Roberta filed her Chapter 7 bankruptcy case 16 years ago in 1993, and it makes no difference whether those "wages" are treated as community property or separate property. There is absolutely no authority to support the proposition that "wages" are treated as "assets" in bankruptcy. They are not.

The next step in this analysis is to assume, *arguendo*, that the transmutation agreement that Roberta and David executed in 1995 wherein they transmuted Roberta's wages from community property to her separate property, was some form of a fraudulent transfer. Such a fraudulent transfer, even if proven, has no viability because of the permanent injunction under §524(a)(3) that was granted to Roberta when she obtained her discharge. If Roberta's liability to Rooz was discharged in Roberta's 1993 Chapter 7 case, it makes no difference whether Roberta's future wages are treated as her separate property or as community property. That discharge and the resulting injunction provided by §524(a)(3) fully protects Roberta from all creditor claims with respect to her post-discharge acquisition of any forms of property, separate or community.

Certainly an exception to the foregoing statement would apply with respect to David's creditors who seek to levy upon ***David's separate property*** to satisfy their claims, assuming of course they can prove that David himself is liable on the debt. However, that collection activity halted when David obtained a bankruptcy discharge. When that bankruptcy discharge occurred in David's bankruptcy case, the only creditor remedy that remained was a nondischargeability case against David, but, as explained in David's opposition to Rooz's petition in the related case, No. 80-1155, the bankruptcy court dismissed Rooz's nondischargeability case due to lack of fraud specificity.

Boiled to its essence, what Roberta is saying is this. When she obtained her discharge in 1993, from then on the permanent injunction of §524(a)(3) prevented Rooz from levying against any of her separate property and from levying against ***all*** of her community property, including any community property she shared with her husband David. From then on, the only property that Rooz could levy against was David's separate property, but that limited collection remedy disappeared when David himself obtained a bankruptcy discharge in his 2005 Chapter 7 case.

Thus, based upon the protection granted by §524(a)(3), Rooz's UFTA argument has no firepower. Whether or not Rooz has a UFTA remedy, it makes no difference. He had no right to sue Roberta. Her 1993 bankruptcy discharge fully protected her, and, incidentally, it also fully protected her husband David to the extent that David owned or had an interest in any community property.

Another fundamental reason why Rooz's UFTA argument against Roberta falters is because of the seven-year statute of repose set forth in Cal. Civ. Code §3439.09(c), which provides:

> Notwithstanding any other provisions of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.

In the present case, the transfer occurred, if at all, when Roberta and David executed their postnuptial agreement in 1995, some 14 years ago, which means that any UFTA claim arising out of that transaction is now time-barred.

The bankruptcy court and the BAP briefly discussed this statute of repose issue, but they concluded that "in view of the controlling effect of the community property discharge injunction imposed by §524(a)(3), the bankruptcy court's conclusion (with which we have no quarrel) that the UFTA cause of action filed 11 years after the challenged transfer is barred was addressed to a moot point." [BAP decision at p.16, lines 8-12, which can be found in Rooz's Appendix B at page 21a.]

On page 11 of his brief, Rooz contends that this rejection of his UFTA argument conflicts with a Seventh Circuit decision in a case entitled *McClellan v. Cantrell,* 217 F.3d 890 (7th Cir. 2000). Again, Rooz is mistaken.

McClellan states that a bankruptcy trustee may use the UFTA remedy to reach a fraudulently transferred asset held by a third party transferee, in order to bring that asset back into the bankruptcy estate. But, as explained above, that UFTA remedy does not apply to this case because (1) the transferee (Roberta) has been discharged from the same debt, and (2) the asset, "wages," is not an asset that is administered in a bankruptcy proceeding. This means that Rooz's statement at the bottom of page 13 of his petition

wherein he states, "the wife [Roberta] has become a third party transferor [sic] whose holdings are reachable by the creditor following disclaimer by the Trustee," has no relevance to this case. This "transferee" (i.e., Roberta) has been discharged from this debt, and the "holdings" that Rooz refers to in his petition are wages which are never treated as an asset of a bankruptcy estate.

The *Sanwa* case cited by Rooz in his petition (*Sanwa Bank California v. Chang*, 87 Cal.App.4th 1314 (2001)) does not change this result. Unlike the present case, the transferee wife in *Sanwa* never sought any bankruptcy protection, and the asset under review in the *Sanwa* case was real property (the family residence) which is an asset that is routinely administered in bankruptcy, unlike wages that are never administered in bankruptcy. Nowhere in his petition has Rooz made any attempt to explain how these important distinctions in the *Sanwa* case enable him to use the UFTA to reach Roberta's wages to satisfy his 1995 state court judgment.

III. ROBERTA'S WAGES ARE THE ONLY "ASSET" AT ISSUE IN THIS CASE

To provide some overall clarity to Rooz's attempt to sue Roberta to enforce his 1995 state court judgment, it must be stressed that the only asset that Rooz has been talking about throughout all of these court proceedings has been Roberta's wages. He has not referred to any other forms of property, real or

personal. This being the case, Roberta's bankruptcy discharge that was granted to her as part of her 1993 Chapter 7 case has three significant consequences in her favor.

First, she is no longer personally liable on the debt, in view of the bankruptcy discharge she received in 1994.

Second, any UFTA claim that Rooz has asserted against Roberta's wages is barred by the seven-year statute of repose.

Third, the asset in question, wages, is not an asset that is administered by a bankruptcy trustee. The only assets that are administered by a bankruptcy trustee are various forms of real property, such as a family home or a commercial building, or various forms of personal property, such as bank accounts, vehicles, accounts receivable, or fixtures and equipment. There is no line item anywhere in the bankruptcy schedules for a bankruptcy debtor to schedule "wages" as an asset of the bankruptcy estate. Thus, Rooz's ongoing argument that David failed to disclose his wife's "wages" in his bankruptcy petition has no merit.

CONCLUSION

Aside from the fact that this petition raises no conflict among the circuit courts that needs to be resolved, and aside from the fact that there is no

issue of great national importance raised in this petition on the merits, Rooz's claim against Roberta, unlike the creditor claim against the non-debtor spouse in the *Sanwa Bank* case, cited above, cannot be allowed to proceed because Roberta obtained a bankruptcy discharge which covered this same debt, and because the asset that she holds are her post-petition wages protected by §524(a)(3), and because wages are never administered as an asset in a bankruptcy case.

For all of these reasons, Rooz's Petition for a Writ of Certiorari should be denied.

April 15, 2009

Respectfully submitted,

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